

Supreme Court of the United States

October Term, 1953

No.  23

ROBERT A. McALLISTER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT A. McALLISTER, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on the 12th day of November, 1953.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (No. 48—October Term, 1953); officially reported in 207 F. (2d) 952.

Jurisdiction

The judgment of the Court of Appeals was entered on the 12th day of November, 1953. Reargument was denied on the 3rd day of December, 1953. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254.

Basis for the Reversal by the Court Below of the Decision of the Trial Judge

The decision of the Trial Court was reversed and the libel dismissed by the process of philosophizing in medicine, assuming facts without the record, basing a presumption on theory and imagination and holding that an inference could be drawn from said presumption, which did nullify the probative value of affirmative proof and expert medical opinion.

The basis upon which the Court below substituted its opinion for that of a Trial Court, does not seem to be in accord with the principle of due process of law and the intent of Congress to recognize seamen as wards of the Admiralty Court and assure to them the same rights on the admiralty side as they have on the law side of the Court.¹

¹ In *McAllister v. Cosmopolitan Shipping Co. Inc.*, 169 F. 2d 4, Judge Augustus N. Hand stated that the evidence was sufficient to sustain the finding of the triers of the fact. In the case at bar, he stated the same evidence was not sufficient to sustain the finding of the trier of the fact.

In the case at bar, he said that a "permissible" contrary inference was not only a proper subject of review by an Appellate Court, but constituted cause for a mandatory dismissal.

In the case of *The Niel Maersk*, 91 F. 2d 932, the same judge, Augustus N. Hand, held that a permissible inference did not constitute a basis for review by an appellate court.

The reversal of the Trial Court's decision lacked legal sufficiency, being based on inferences drawn from theories and not facts and lacking the immediate quality which sensible men influenced by observation, experience and reason would draw from clearly established facts.

An inference is a presumptive rule of evidence having no "vested right".

Questions Presented

1. After a Circuit Court of Appeals decides that:

"* * * either of several inferences was permissible," is the question as to which of said "permissible" inferences was accepted or rejected by the Trial Judge—a proper subject for review by said Appellate Court; or does a dis-

See: *In re Victor's Ladies Shop*, 45 F. Supp. 417;
Guaranty Trust Co. v. U. S., 44 F. Supp. 417, affirmed 139
 F. 2d 69.

The law has never authorized the drawing of one inference from another without proof of existent facts.

Home Ins. Co. v. Weide, 78 U. S. 438, 11 Wall. 438, 20
 L. Ed. 197.

Theories cannot be presumed as a basis for drawing inferences.

See: *Chicago, M. & St. P. Ry. Co. v. Coogan*, 46 S. Ct. 564,
 271 U. S. 472, 70 L. Ed. 1041.

There is no legal significance to an inference unless it is immediate to the facts proved.

See: *Manning v. John Hancock Mut. Life Ins. Co.*, 100
 U. S. 693, 25 L. Ed. 761.

There being no proof that flies are carriers of polio virus, and there being no proof that fellow crew members went ashore and became carriers, there is no fact upon which the inference drawn by the Court below can be predicated. No fact appearing, the presumption is that no such fact existed. There being no fact to support the same, there is no legal basis for drawing the inference therefrom.

See: *The Clara*, 102 U. S. 200, 26 L. Ed. 145, affirming
 Fed. Cas. No. 2, 787, 13 Blatchf. 502.

missal based on an inference having no legal or factual support constitute a denial of due process of law? ²

2. In a proceeding in admiralty, must the libelant prove his cause of action beyond doubt, as well as anticipate and affirmatively disprove every inferred defense in order to sustain his right to recover, although at law his burden of proof would be only by a preponderance of the evidence?

Introduction

Heretofore, and on the 16th day of July, 1946, Robert A. McAllister filed suit pursuant to the provisions of the Jones Act, 46 U. S. C., Section 688, for damages for personal injuries against the Cosmopolitan Shipping Co. his alleged employer.

In said prior action, a jury returned a verdict in his favor in the sum of \$100,000 on the 9th day of February, 1948. Judgment was entered on the 24th day of February, 1948.

The Trial Judge, Alfred C. Coxe refused to disturb the verdict. On appeal, the Court below sustained the verdict. *McAllister v. Cosmopolitan Shipping Co., Inc.*, 169 F. 2d 4.

² An inference cannot be based upon an inference.

U. S. v. Ross, 92 U. S. 281, 23 L. Ed. 707;
Old South Lines v. McCuiston, 92 F. 2d 439;
Cunard S. S. Co. v. Kelley, 126 F. 610, 61 C. C. A. 532;
Brown v. Maryland Casualty Co., 55 F. 2d 159;
Falstaff Brewing Corporation v. Thompson, 101 F. 2d 301;
Tucker v. Traylor Engineering & Mfg. Co., 48 F. 2d 783;
U. S. v. Mammoth Oil Co., 14 F. 2d 705, aff'd 275 U. S. 13,
 48 S. Ct. 1, 72 L. Ed. 137;
The Glasgow Maru, 1 F. 2d 503;
Gas Service Co. v. Hunt, 183 F. 2d 417;
Schindley v. Allen-Sherman-Hoff Co., 157 F. 2d 102;
Waters v. National Life & Acc. Ins. Co., 156 F. 2d 470;
Travelers Ins. Co. v. Warrick, 172 F. 2d 516.

On appeal to this Court, the judgment of the Court below was reversed and the complaint dismissed. The Court held that the relationship of employer and employee did not exist, therefore the action could not lie. *Cosmopolitan Shipping Co. Inc. v. McAllister*, 337 U. S. 783, 69 S. Ct. 1317.

In its opinion the Court commented on the need for legislative relief at page 794 as follows:

“Legislative relief is requisite not only to save to litigants possessing meritorious claims their right to a day in court, but also to settle the question of remedy in future cases.”

McAllister petitioned Congress for legislative relief.

On the 13th day of December, 1950, Congress enacted an enabling act known as Public Law 877—81st Congress, extending the statute of limitations within which to sue the Government for a period of one year.

The present action was then brought by Robert A. McAllister on July 5, 1951, pursuant to the Suits in Admiralty Act, 46 U. S. C., § 741, *et seq.*

On the 11th day of March, 1953, Judge Robert A. Inch, sitting in Admiralty in the United States District Court for the Eastern District of New York decided that McAllister was entitled to damages in the sum of \$80,000. A final decree of \$80,051.50 was entered on the 20th day of March, 1953.

The Court below reversed the decision of the Admiralty Court and dismissed the libel on the 12th day of November, 1953.

The Court below did not take issue with any finding of fact by the Trial Court.

The Court below in its opinion, 207 F. (2d) 952, stated at page 954:

" * * * In an action under the Jones Act, the jury had found the operation of THE HAINES negligent on much the same facts we have here. * * * Moreover, the jury as the fact finding body traditionally had more scope in reaching its result than would the judge in the present case."

The sole basis for the reversal of the Trial Court's decision seems to be expressed by the following language (pp. 954, 955):

" * * * Since either of the several inferences was permissible, the party having the burden of proof must lose."

We believe that the holding by the Court below is not sustained by the record of the case, nor by any applicable law, and constitutes a denial of due process of law.³

Statutes Invoked

Constitution of the United States of America,
Fifth Amendment;

Title 28, U. S. C., Sec. 1254;

Title 46, U. S. C., Sec. 688, Jones Act;

Title 46, U. S. C., Sec. 741, *et seq.*, Suits in Admiralty Act;

Title 46, U. S. C., Sec. 781 *et seq.*, Public Vessels Act of 1926;

Title 50, U. S. C. Appendix, Sec. 1291, Public Law 17;

Public Law 877—81st Congress.

³ Constitution of the United States of America, Fifth Amendment.

Statement

Robert A. McAllister was born at Brooklyn, New York, on the 16th day of July, 1920 (R. 76). He is a married man living with his family (R. 76). He started going to sea in July of 1941. He holds various engineers' licenses (R. 77).

The S.S. EDWARD B. HAINES sailed from New York on July 31, 1945 for the Far East (R. 77).

McAllister was employed as a 2nd assistant engineer at a salary of \$220 per month (R. 78). He first took sick about the 9th or 10th of November, 1945, while the vessel was on the voyage from Hong Kong back to Shanghai (R. 78). He received no medical treatment during his entire illness and was bedridden without any solid food from November 21st until December 1st, 1945.

He had not mixed with any Chinese ashore (R. 82).

There is no proof that any crew member violated the master's orders and mixed with Chinese ashore.

He had been in good health when he joined the vessel (R. 83). By the time he was removed from the vessel he was partly paralyzed (R. 84), and had many complaints (R. 84 and 85). He was removed from the vessel and taken to the Marine Corps Hospital at Tsing Tao in North China, at which time his condition had so deteriorated that he had to be fed intravenously (R. 86).

Judge Inch summarized the facts of the case in his opinion as follows:

"Libelant signed on the 'Haines' as a Second Assistant Engineer on July 23, 1945 at a monthly wage of \$220 plus overtime. Prior to sailing libelant passed a physical examination by doctors of the

War Shipping Administration. The vessel proceeded via the Suez Canal to the Far East, arriving at Shanghai on September 26, 1945. It thereafter remained in Chinese waters until December 3, 1945. The master of the vessel having been warned that there was poliomyelitis and other contagious diseases ashore at Shanghai, and that poliomyelitis 'was all over down there * * * in China and all through the tropics', caused notices to be posted on the ship warning members of the crew of the existence of poliomyelitis and other diseases ashore and cautioning them to exercise care in eating and drinking and to avoid association with the inhabitants ashore. On several occasions the master mustered the crew and personally warned them to the same effect. Libellant testified that he obeyed these warnings, and there is no evidence in the record to the contrary.

The 'Haines' took a short trip to Hong Kong and arrived back at Shanghai on November 11, 1945. At that time a number of Chinese coolies were allowed to come aboard to perform stevedoring work, and prior to the ship's departure for Tsingtao on November 23, 1945, 40 to 50 Chinese soldiers, in addition to 25 Chinese truckdrivers and 25 Chinese mechanics, were also taken aboard as passengers.

The toilet facilities then provided by the ship for the Chinese who thus came aboard consisted of a temporary wooden trough extending over the ship's side with running water supplied to it by a hose laid on the deck. Libellant testified that because the hose was turned off he was required on one or two occasions to go up deck and open the valve. In addition, the master of the ship testified that 'no arrangements were made' to keep the Chinese personnel

from using the ship's regular toilet facilities, 'that was up to the officers, to keep them out of their quarters, that is all.' There was further evidence that the Chinese did in fact use the crew's toilet facilities and that they also used a common drinking fountain on deck'' (R. 427, 428).

Judge Inch further stated:

"* * * In my judgment libelant established by a preponderance of credible evidence that respondent was guilty of negligence in permitting conditions to exist on shipboard which were conducive to the transmission of polio, and that libelant was unduly exposed to infection from these conditions, and it may reasonably be inferred from the evidence that libelant contracted polio on shipboard due to the negligence of respondent rather than having contracted it ashore'' (R. 429).

The Trial Court found in favor of the respondent as to that part of the libel predicated on failure to treat.

The Trial Court found respondent negligent in causing the S.S. EDWARD B. HAINES to be brought into an epidemic area and in close proximity with carriers of poliomyelitis and in the further fault of the master, in inviting Chinese coolies and others from said epidemic area to have unrestrained freedom of the use of the vessel and liberty to commingle with the crew.

The Trial Court believed Dr. Frant, petitioner's medical expert, that the inviting of the disease aboard the

vessel and giving it free rein thereon was the direct and proximate cause of McAllister's illness.⁴

The Court below based its reversal of the Trial Court's decision on what it termed "permissible inferences", holding that an inference which could be and was rejected by a jury on the law side, constituted a complete bar to recovery on the admiralty side of the Court. There was no finding by the Court below that the decision of the Trial Court was clearly erroneous or extravagant in fact. *Brooklyn Eastern District Terminal v. United States*, 287 U. S. 170, 53 S. Ct. 103. A wide range of judgment is conceded to the triers of the facts. *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 A. 413, L. R. A. 1915C, 319, cited with approval in *Brooklyn Eastern District Terminal v. United States, supra*.

⁴ Dr. Samuel Frant, First Deputy Health Commissioner of the City of New York, Professor of Epidemiology at Columbia University, author of works on Epidemiology (R. 91), in charge of control of polio epidemics in various cities in the United States and having the responsibility of running the Department of Health of the City of New York (R. 95), testified that the large number of Chinese truck-drivers, mechanics, civilian employees and others who were brought aboard from the epidemic areas (R. 98) was the producing cause of spreading polio and that in his opinion McAllister became infected as a direct result of these men being brought aboard the ship (R. 99).

He testified that the disease was carried by human beings who have the organism either in their intestinal tract or in their nose and throat (R. 103).

Dr. Robert Ward, respondent's Epidemiologist, agreed with Dr. Frant that the polio virus is spread from person to person by way of mouth into the respiratory tract (R. 365). He testified:

"The role playeed by flies in the transmission of poliomyelitis has not been determined" (R. 367).

Assignment of Errors

The Court below was in error in holding:

1. The measure of proof, by a preponderance of the evidence, applies only on the law side of the Court but that the Rule in Admiralty requires proof beyond doubt in order to sustain an award of damages.

2. In substituting its opinion based solely on an inference of an inferred defense or theory not pleaded, not within the record, factually unsupported, medically unsound and insufficient at law, in place of the decision of the Trial Court who heard and saw the witnesses and predicated his decision on uncontradicted evidence and scientific medical proof.

3. That the Trial Court in Admiralty does not have the same conclusive power as a jury to reject unbelievable or unsupported inferences, but must seek a contrary "permissible" inference or theory, even beyond the record, and give to it the legal effect of nullifying the probative value of all affirmative proof of liability.

Historical Background

Judge Learned Hand has given us the benefit of an extensive and most scholarly study as to the weight given findings by a Trial Court commencing with the period of 1789 to 1803 and continuing down to 1942.

He concluded that it would be positively mischievous to make a distinction between the degree of finality to be granted the findings of a judge sitting in admiralty and the findings of the same judge sitting in equity or at law, as a distinction breaking down into mere verbiage, breeding confusion.

Petterson Lighterage & T. Corp. v. New York Central R. Co., 126 F. (2d) 992.

The Court below in the case of *Petterson Lighterage & T. Corp. v. New York Central R. Co.*, *supra*, made no distinction as between human rights and property rights.⁵

⁵ *Petterson Lighterage & T. Corp. v. New York Central R. Co.*, 126 F. (2d) 992:

"[3] Formally, findings in the district courts were, it is true, an innovation in admiralty procedure in 1930, but in substance they were very old. During the period between 1789 and 1803, Sec. 21 of the Judiciary Act, 1 St. L. 83, gave the right of appeal to the circuit court from decrees in admiralty of the district court where the amount was over \$300; between \$50 and \$300 a writ of error alone was available (Sec. 22). *Wiscart v. D'Auchy*, 3 Dall. 321, 1 L. Ed. 619. But the Act of 1803, 2 St. L. at L. 244, changed this so that until 1875 all decrees were reexaminable on the facts in the circuit court and indeed new evidence could be admitted. By Sec. 1 of the Act of 1875, 18 St. L. 315, the circuit court was required to make findings of fact for use upon appeals to the Supreme Court, whose review was confined to questions of law; but the review upon appeal to the circuit court from the district court remained unchanged. The Act of 1891 establishing circuit courts of appeal, 26 St. L. 826, transferred to them the jurisdiction of the Supreme Court over appeals in admiralty; and we held in *Munson S.S. Line v. Miramar S.S. Co.*, 2 Cir. 167 F. 960, that it repealed the provisions for findings of fact without imposing any similar duty on the district court, although its decisions on the facts continued to be open to review as they had been by the circuit court. Certainly no one has doubted since 1891 that the circuit courts of appeals have power to review the facts; but so they have in all other causes tried to a judge, and for that matter in causes tried to a jury. The question is not of the existence of such a power but of its limits. We are not entirely clear that the Ninth Circuit in *The Ernest H. Meyer*, 84 F. 2d 496, meant to hold that upon admiralty appeals it had a broader power than it has under Rule 52(a), Federal Rules of Civil Procedure; but if so, we cannot agree. Much confusion has arisen, as we apprehend it, from the varying language which judges have used to describe what has now become the rubric of Rule 52(a). As we have said, the decisions are myriad in which findings of the district court have been in fact treated

Reasons for Granting the Writ

The Court below has created the hiatus; that while rights under remedial legislation are not questioned, the remedies are cut off.

The Court below has enunciated a new and revolutionary Rule in Admiralty which seems contrary to the intent of Congress and which is in conflict with the uniform holdings by this Court.

There is a serious conflict of opinion between the Court below and other Circuit Courts of Appeal.

It would seem that the Court below was in error when it rendered the decision in the case at bar which placed a greater burden of proof for the recovery of damages on the admiralty side than on the law side of the Court and permitted inferences to be based upon improper theories so as to constitute a bar to recovery in admiralty.

This Court has held that substantive rights are not to be denied or measured by reason of choice of Court or forum. *Pope & Talbot, Inc. v. Hawk et al.*, 74 S. Ct. 202.

as final, but the locutions have varied by which the courts have described how far they thought themselves limited. We have gathered a number of these in the appendix annexed to this opinion; and an examination of them at once shows that they differ only in form from the phrase, 'clearly erroneous,' of Rule 52(a). All were designed to measure the reluctance of the appellate court to disturb what the trial court with its better opportunities had determined; and it is indeed at times possible to compare such reluctances when they imply a real difference in the temper of the approach; as for example that which protects a verdict, from that which protects the finding of a judge. But if one pretends to discover any difference between the degree of finality to be granted the findings of a judge sitting in admiralty and findings of the same judge sitting in equity or at law, the distinction breaks down into a verbiage which is not only inapplicable in practice, but positively mischievous in breeding confusion" (p. 995).

The benefits created by Congress are frequently measured by judicial interpretation.

An erroneous interpretation of law can limit or destroy substantive rights.

The great wisdom and many years of experience of the Court below in admiralty matters encompassing the greatest maritime center in the world, makes an enunciation by the Court below of a new rule of law, particularly in admiralty, a matter of national as well as international importance.

Such interpretation will carry great weight in all future cases in admiralty, where recovery of damages is sought.

Although both Congress and the Supreme Court of the United States have clearly charged that there shall be no differentiation as between the law and the admiralty side of the Court in adjudicating substantive rights, the Court below seems to have increased the burden of proof in Admiralty far beyond requirement at law and precedent.

The Court below held that the same evidence which was sufficient on the law side, was insufficient on the admiralty side of the Court, to sustain the burden of proof.

The evidence adduced at the trial of the case at bar was held by the Court below as sufficient to sustain a jury's verdict. *McAllister v. Cosmopolitan Shipping Co.*, 169 F. 2d 4 (reversed on other grounds, 337 U. S. 783, 69 S. Ct. 1317).

The Court below in the above prior case stated at page 7:

"We accordingly hold that there is a basis in the record for a finding by the jury that the defendant was negligent in failing to protect the plaintiff from contact with polio infection as well as in not giving him prompt and adequate treatment after the infection occurred."

(We would like to call particular attention to the words "as well as".)

The same Court below in the case at bar stated at page 106:

"Judge Inch quoted extensively from a prior decision of this court, 169 F. 2d 4 (reversed on other grounds, 227 U. S. 783), affirming a judgment for the libelant where, in an action under the Jones Act, the jury had found the operation of The Haines negligent on much the same facts we have here."

The *Suits in Admiralty Act*, 46 U. S. C. 741 *et seq.* and *Public Law 17*, 50 U. S. C. Appendix, § 1291, states, in substance, that any merchant marine sailing as a Government employee is accorded the same rights, benefits and privileges enforceable against the United States as are possessed by seamen on privately owned vessels against their employer.

See:

Remedies of Merchant Seaman Injured on Government Owned Vessels, 55 Yale Law Journal 584, 591, at page 591.

Uniformity and equality on the basis of a recovery for damages at law as in Admiralty seems to have been the intent of Congress, not only as clearly expressed in the various Seaman Acts, but likewise by interpretation of law by the Supreme Court of the United States, since the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, up to and including the decision in *Pope & Talbot, Inc. v. Hawn*, *supra*.

Mr. Justice Reed in his dissenting opinion (as to this view the entire Court seems to be in accord) in *Hust v.*

Moore-McCormack Lines, 328 U. S. 707, 66 S. Ct. 1218, at page 748, stated as follows:

"Congress has been generous in permitting seamen to recover in court against the United States for torts. It felt that the traditional proceeding in admiralty offered the best opportunity for justice to all such injured seamen when they were employees of the United States. '12'."

The authorities relied on by the Court below do not seem to be persuasive. The construction placed on the holdings of the cases cited: *Pennsylvania R.R. Co. v. Chamberlain*, 288 U. S. 333, 339; *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663; *Goodrich v. United States*, 5 F. Supp. 364, 365, seems erroneous, but assuming for the sake of argument that said cases do constitute valid authorities, the holding that a contrary inference destroys the probative value of direct evidence, is in conflict with the holding by this Court in the cases of:

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413;

Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409;

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740;

Myers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1334.

The Supreme Court of the United States in *Pope & Talbot v. Hawn*, *supra*, reiterated the well established and uniform principle of law that the same substantive rules of decision are applied whether the suit proceeds at common law, in state or federal tribunals, or in the admiralty.

See also:

Garrett v. Moore McCormack Lines, Inc., 317 U. S. 239, 63 S. Ct. 246;

Lindgren v. United States, 281 U. S. 38, 50 S. Ct. 207;

Curtis Bay Towing Co. v. Dean, 174 Md. 498, 199 Atl. 521.

The law was first laid down in *Southern Pacific & Co. v. Jensen*, *supra*, citing *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *Rodd v. Heartt*, 17 Wall. 354, 21 L. Ed. 627.

Mr. Justice Bradley expressed the intent of Congress: that it is Congress, and Congress alone, which has the power to limit or regulate maritime law: *

The law laid down by this Court in *Lavender v. Kurn*, *supra*, seems to be the same as stated by the Supreme Court of the State of New York in the case of *Stubbs v. The City of Rochester*, 226 N. Y. 516, at page 526, as follows:

"If two or more possible causes exist, for only one of which a defendant may be liable, and a party injured establishes facts from which it can be said with reasonable certainty that the direct cause of the injury was the one for which the defendant was liable the party has complied with the spirit of the rule."

On page 527, the Court said that the complaint should not have been dismissed below, as follows:

"On the contrary, the most favorable inferences deducible from the plaintiff were such as would justify a submission of the facts to a jury as to the reasonable inferences to be drawn therefrom, and a verdict

* *Remedies of Merchant Seaman Injured on Government Owned Vessels*, 55 Yale Journal, *supra*;

Cases Collected in Note (1943) 10 University of Chicago Law Review, 339;

Palfrey, The Common Law Courts and the Law of the Sea (1923);

36 *Harvard Law Review*, 777-785-6;

Garrett v. Moore McCormack Lines, *supra*;

Lindgren v. U. S., *supra*;

Curtis Bay Towing Co. v. Dean, *supra*;

Cosmopolitan Shipping Co. v. McAllister, *supra*;

Pope & Talbot, Inc. v. Harau, *supra*;

The Lottawanna, *supra*;

Southern Pacific Co. v. Jensen, *supra*.

thereon for either party would rest not on conjecture but upon reasonable possibilities." ⁷

Justices Cardozo, Pound and Andrews concurred.

⁷ *The Niel Maersk*, 91 F. 2d 932;

The Nichiyo Maru, 89 F. 2d 539;

Isthmian S. S. Co. v. Martin, 170 F. 2d 25;

Ellis v. Union Pac. R. Co., 329 U. S. 649, 67 S. Ct. 598:

"The choice of conflicting versions, truth of witnesses and inferences drawn from controverted and uncontroverted facts are questions for the jury. If there is a reasonable basis for the conclusions of the jury it is an invasion of their function for the Appellate Court to draw contrary inferences or to conclude that a different conclusion is more reasonable."

Gill v. Pennsylvania R. Co., 201 F. 2d 718:

"For example, even where the evidence is uncontroverted, but gives rise to two equally plausible inferences (one that the defendant was at fault and the other than he was not), * * *. The choice of conflicting versions of the way the accident happened * * * is a question for the jury. * * * Apparently then, so long as the evidence supports the particular inference the jury draws from it, the verdict may not be disturbed even though other equally reasonable inferences could have been drawn from the same uncontroverted evidence" (p. 720).

Garfield Memorial Hospital v. Marshall, 204 F. 2d 721:

"The jury was not required, we think, to put aside this affirmative evidence on the speculation that some unproved factor may have caused the injury" (p. 728).

Railway Exp. Agency, Inc. v. Clark, 194 F. 2d 29:

"We have noted * * * the decided trend to caution in substituting the view of the court for the findings of the trier of facts, where they are based upon oral evidence, in the presence of court or jury" (p. 31).

Wetherbee v. Elgin, Joliet & Eastern Ry. Co., 191 F. 2d 302;

Korte v. New York, N. H. & H. R. Co., 191 F. 2d 86;

Standard Acc. Ins. Co. of Detroit, Mich. v. Winget, 197 F. 2d 97;

Scott v. Gearner, 197 F. 2d 93;

Fleming v. Kellett, 167 F. 2d 265;

Bolan v. Lehigh Valley R. Co., 157 F. 2d 934;

Stanczak v. Penn R. Co., 174 F. 2d 43;

Stanford v. Penn. R. Co., 171 F. 2d 632.

The late Chief Judge Marcus Campbell of the U. S. District Court for the Eastern District of New York followed this view in the case of *Lancashire Shipping Co. v. Morse Drydock & Repair Co.*, 43 F. 2d 750.

In the case of *American Stevedores v. Forella*, 330 U. S. 446, 67 S. Ct. 847, this Court reviewed the origin, purpose and intent of the *Public Vessels Act of 1926*, 46 U. S. C. 781, *et seq.* which (except for the nature of the vessel involved, has the same effect as the *Suits in Admiralty Act*, 46 U. S. C. 741, *et seq.*

In said case, this Court clearly expressed the view that the opinion in *Canadian Aviator, Ltd. v. United States*, 324 U. S. 215, 65 S. Ct. 639, should be liberally construed, and that an action against the United States Government would not be barred by the enforcement of strict technical interpretation of the right to recover against the United States Government in an admiralty action.

The probative force of medical evidence should have no lesser weight on the admiralty than on the law side of the Court. In the case of *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620, 64 S. Ct. 724, the Court stated at pages 627 and 628:

"The rule has been stated 'that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony.' *Spring Co. v. Edgar*, 99 U. S. 645, 658, 25 L. Ed. 487. * * * the jury, even if such testimony be uncontradicted, may exercise their independent judgment.' *The Conqueror*, 166 U. S. 110, 131, 17 S. Ct. 510, 518, 41 L. Ed. 937. * * * the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.' *Sonentheil v. Christian Moerlein*

Brewing Co., 172 U. S. 401, 408, 19 S. Ct. 233, 236, 43 L. Ed. 492."*

Petitioner has sustained his burden of proof by the standard of the dissenting as well as the prevailing opinion in the case of *Wilkerson v. McCarthy*, *supra*.

Mr. Justice Frankfurter in his concurring opinion stated at page 419:

"But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree whether proof in a case is sufficient to demand submission to the jury."

Mr. Justice Jackson in his dissenting opinion stated at page 424, as follows:

"This Court now reverses and, to my mind at least, espouses the doctrine that any time a trial or appellate court weighs evidence or examines facts it is usurping the jury's function. * * * Determination of whether there could be such a basis is a function of the *trial court*, even though it involves weighing evidence and examining facts." (Italics ours).

*The weight to be given opinion expert evidence is always a matter for appraisal and judgment of the trial court or jury in the light of all circumstances of the particular situation.

Hatchinson v. Johnston, 122 F. 2d 137;

Preston v. Aetna Life Ins. Co., 174 F. 2d 10;

Empire Oil & Refining Co. v. Hoyt, 112 F. 2d 356;

Public Service Co. of New Hampshire v. Elliot, 123 F. 2d 2;

O'Donnell v. Geneva Metal Wheel Co., 183 F. 2d 733;

Chapman v. U. S., 169 F. 2d 641;

Boston Ins. Co. v. Read, 166 F. 2d 551;

Kamatser v. Chrysler Corp., 199 F. 2d 610;

U. S. v. Francis, 64 F. 2d 865;

Anderson v. Baltimor. & O. R. Co., 96 F. 2d 796;

Sevenson v. Mutual Life Ins. Co. of New York, 87 F. 2d 441.

The evidence had satisfied a jury and two trial judges; Alfred C. Coxe in the jury trial and Senior Judge Robert A. Inch, in admiralty, each having a lifetime of maritime and trial experience. The decision of the Trial Court was not a proper subject of review on appeal and the record presented no justification in fact or law for the reversal.⁹

⁹ *C. J. Dick Towing Co. v. The Leo*, 202 F. 2d 850 (pp. 853, 854):

"Admittedly, there is no other testimony which, if believed, might have supported a contrary determination by the trial court. But where, as here, the oral testimony relied upon to support the findings is in sharp dispute, we are no more authorized, merely because the case is in admiralty, to substitute our findings for those of the trial court under Admiralty Rule 46½, 28 U. S. C. A., than we would have been to substitute them for findings made under Rule 52(a), Fed. Rules Civ. Proc. 28 U. S. C. A., had this been a civil case tried without a jury. *Colvin v. Kokusai Kisen Kabushiki Kaisha*, 5 Cir., 72 F. 2d 44, 46; *Pettersen Lighterage & Towing Corp. v. New York Central R. Co.*, 2 Cir., 126 F. 2d 992, 995. Under such circumstances, since we cannot say that the findings of the trial court are 'clearly erroneous', we accept them as binding upon this Court. *Colvin v. Kokusai Kisen Kabushiki Kaisha*, supra; *Pettersen Lighterage & Towing Corp. v. New York Central R. Co.*, supra; *Ore Steamship Corp. v. D/S A/S Hassel*, 2 Cir., 137 F. 2d 326, 329; *P. Dougherty Co. v. S. S. Manchester Exporter*, 2 Cir., 140 F. 2d 572, 573; *The C. W. Crane*, 2 Cir., 155 F. 2d 940, 941; *Merritt-Chapman & Scott Corp. v. United States*, 2 Cir., 174 F. 2d 205, 206; see also *Gatewood v. Sanders*, 4 Cir., 152 F. 2d 379; *Lucayan Transports, Ltd. v. McCormick Shipping Corp.*, 5 Cir., 188 F. 2d 202, 205; *Hutchinson v. Dickie*, 6 Cir., 162 F. 2d 103, 106; *Bornhurst v. United States*, 9 Cir., 164 F. 2d 789; *Cappelen v. United States*, 88 U. S. App. D. C. 11, 185 F. 2d 754, 755; Cf. *Johnson v. Cooper*, 8 Cir., 172 F. 2d 937, 940; 1 Am. Jur. Admiralty, Sec. 135, p. 613; 2 C. J. S. Admiralty, §§ 188, 192a, pages 321, 326; cf. Annotation in 103 A. L. R. 791, et seq."

Wood Towing Corporation v. Paco Tankers, 152 F. 2d 258 (p. 262):

"This court held in *The Ed Luckenbach*, 4 Cir., 93 F. 841, 843: '••• the rule prevails in cases like this that the decree

of the trial judge will not be disturbed upon mere questions of fact depending upon the credibility of witnesses who testified before him, unless there is found to be a decided preponderance of the evidence against the same.'

We have repeatedly held to the same effect and we know of no authority to the contrary.

See, also, *The Ambridge*, 4 Cir., 42 F. 2d 971; *The Corapeake*, 4 Cir., 55 F. 2d 228; *Virginia Shipbuilding Corp. v. United States*, 4 Cir., 22 F. 2d 38; *The District of Columbia*, 4 Cir., 74 F. 2d 977, 103 A. L. R. 768."

Walter G. Houghland, Inc. v. Muscovalley, 184 F. 2d 530 (p. 531):

"(2) In *Great Lakes Towing Co. v. American S.S. Co.*, 6 Cir., 165 F. 2d 368, this court held that an appeal in admiralty is a trial de novo, but that findings of fact of the trial court will not be set aside unless they are against the clear preponderance of the evidence. See also *The Wilhelm*, 1893, 6 Cir., 59 F. 169; *The William A. Paine*, 1930, 6 Cir., 39 F. 2d 586, 588; and *The Home Insurance Co. v. Ciconett*, 1950, 6 Cir., 179 F. 2d 892, 896."

Eastern Tar Products Corp. v. Chesapeake Oil Transp. Co., 101 F. 2d 30 (p. 33):

"It is well settled that the findings of a trial judge who heard the witnesses, and had an opportunity to observe their demeanor on the witness stand, are entitled to great weight and will not be changed by an appellate court unless clearly wrong. *Chesapeake Lighterage & Towage Co. v. Baltimore Copper Smelting & Rolling Co.*, 4 Cir., 40 F. 2d 394, and cases there cited."

Bentley v. Albatross S.S. Co., 203 F. 2d 270 (p. 271):

"(1, 2) As we have frequently observed, an appeal in admiralty partakes of a trial de novo and serves to vacate the decree of the district court; the findings of the latter when supported by competent evidence are entitled to great weight and should, therefore, not be set aside on appeal except upon a showing that they are clearly wrong."

The Ellentalle, 40 F. 2d 47 (p. 48):

"(1) The principle that the findings of fact by a court of admiralty on conflicting testimony of witnesses examined in open court will not be reversed on appeal unless clearly erroneous is too well settled to need citation of authorities. *Dempsey v. Eastern Transportation Co.* (C. C. A.) 275 F. 350, 352;

Lewis v. Stone (C. C. A.) 27 F. (2d) 72; The Adriana (C. C. A.) 6 F. (2d) 860; Southern Pacific Co. v. Haglund, 277 U. S. 304, 48 S. Ct. 510, 72 L. Ed. 892."

Kulack v. The Pearl Jack, 178 F. 2d 154 (p. 155) :

"It is the rule, however, in this and other circuits, that while an appeal in admiralty is a trial de novo, the findings of the district court will be accepted unless clearly against the preponderance of evidence. The William A. Paine, 6 Cir., 39 F. 2d 586; The Perseus, 6 Cir., 272 F. 633; Drowne v. Great Lakes Transit Corporation, 2 Cir., 5 F. 2d 58; Shepard v. Reed, 6 Cir., 26 F. 2d 19."

City of Cleveland v. McIver, 109 F. 2d 69 (p. 71) :

"(1, 2) It has been held so often in this circuit, that though an appeal in admiralty is a trial de novo, the findings of the District Court will be accepted unless clearly against the preponderance of the evidence, that there is no occasion to again consider the scope of the review. Johnson v. Kosmos Portland Cement Co., 6 Cir., 64 F. 2d 193; The Wm. A. Paine, 6 Cir., 39 F. 2d 586; The Perseus, 6 Cir., 272 F. 633. While the verdict of the jury is regarded in admiralty as merely advisory, its approval by the court constitutes the finding of the court. When a petition to set aside the verdict and grant a new trial is overruled, the situation is analogous to that wherein there are concurrent findings of the court and a master, referee or commissioner. In such cases it has long been held that findings are not to be disturbed except for clear demonstration of mistake."

In Re Great Lakes Transit Corporation, 81 F. 2d 441 (p. 443) :

"This finding was made on evidence given by the witnesses in open court, and it is the established rule that a finding based on such evidence is presumptively correct and places upon the party attacking it a heavier burden than would otherwise rest upon him. Shepard v. Reed, 26 F. (2d) 19 (C. C. A. 6); The William A. Paine, 39 F. (2d) 586 (C. C. A. 6)."

The Snug Harbor, 40 F. 2d 27 (p. 29) :

"(1) It is not necessary to quote authorities as to the great weight to be given the findings of the trial judge on questions of fact. Such findings will not be disturbed unless we reach the conclusion that they are clearly wrong, that is, unless it appears that the judge has misapprehended the evidence or gone against the clear weight thereof. This principle has been laid down by this court a number of times, and we know of no authority to the contrary. Pendleton Bros. v. Morgan (C. C.

A.) 11 F. (2d) 67; Standard Phosphate & Acid Works, Inc. v. Chesapeake Lighterage & Towing Co. (C. C. A.) 16 F. (2d) 765; Wolf, etc., Co. v. Minerals, etc., Corporation (C. C. A.) 18 F. (2d) 483; International Organization, United Mine Workers v. Red Jacket Consol. Coal & Coke Co. (C. C. A.) 18 F. (2d) 839; Virginia Shipbuilding Corporation v. United States (C. C. A.) 22 F. (2d) 38; Lewis v. Jones (C. C. A.) 27 F. (2d) 72."

The Mabel, 61 F. 2d 537 (p. 541):

"The testimony, consisting of that of approximately seventeen witnesses, taken in open court, is highly conflicting; and even if we were inclined to differ with the learned trial judge who saw the witnesses, heard their testimony, and had opportunity of passing upon their credibility and accuracy, we would not be warranted in interfering with his findings of fact and conclusions, 'unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law.' *Panama Mail S.S. Co. v. Vargas* (C. C. A.) 33 F. (2d) 894, 895; *Id.*, 281 U. S. 670, 50 S. Ct. 448, 74 L. Ed. 1105; *The Lake Monroe* (C. C. A.) 271 F. 474."

Johnson v. Andrus, 119 F. 2d 287, C. C. A. 2 Cir. (Apr. 28, 1941). Findings of a trial judge should have the same weight under Admiralty Rule 46½, 28 U. S. C. A. as in other civil causes under Rules of Civil Procedure 52(a), 28 U. S. C. A., and should stand unless "clearly erroneous."

The Calvert, 51 F. 2d 494, C. C. A. 4 Cir. (June 19, 1931) (p. 495):

"It has been stated time without number that on an appeal in admiralty the findings of fact of the trial court based on conflicting evidence will not be disturbed on appeal, unless it is shown that such findings are clearly without support in the testimony."

Gibbons v. United States, 186 F. 2d 488, U. S. C. A. 1 Cir. (Dec. 22, 1950) (p. 489):

"We are not to set aside the judgment of the trial court based on his factual findings as to the cause of the accident, where, as here, there was a conflict in evidence, unless such findings are clearly contrary to the preponderance of the evidence, or, what amounts to the same thing, unless such findings are 'clearly erroneous', to borrow the expression in Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. This is the principle which guides our review notwithstanding an appeal in admiralty is said to be a trial *de novo*. See *The*

Josephine & Mary, 1 Cir., 1941, 120 F. 2d 459, 463, citing *The Parthian*, C. C. D. Mass., 1891, 48 F. 564; *Kulack v. The Pearl Jack*, 6 Cir., 1949, 178 F. 2d 154. See especially the illuminating discussion by Learned Hand, C. J., in *Peterson Lighterage & Towing Corp. v. New York Central R. R. Co.*, 2 Cir., 1942, 126 F. 2d 992, 995-96."

United States v. Apex Fish Co., 177 F. 2d 364, U. S. C. A. 9 Cir. (Sept. 9, 1949). The finding by a trial court on controversial evidence will not be disturbed on appeal.

The Potomac, 105 F. 2d 94, U. S. C. A. D. C. (Apr. 17, 1939). The court will not disturb the finding of a trial court who saw and heard witnesses unless manifestly wrong.

The Corapeake, 55 F. 2d 228, C. C. A. 4 Cir. (Jan. 26, 1932):

"This court has repeatedly laid down the rule that the finding of a trial judge, who had the opportunity of seeing the witnesses, hearing their story, judging their appearance, manner, and credibility, on a question of fact, is entitled to great weight and will not be set aside unless clearly wrong."

Rodgers v. United States Lines Co., 189 F. 2d 226, U. S. C. A. 4 Cir. (May 11, 1951) (p. 229):

"This Court is not free to overturn a finding of fact by a trial court unless it is clearly erroneous."

Brast v. Winding Gulf Colliery Co., 94 F. 2d 179, C. C. A. 4 Cir. (Jan. 4, 1938) (p. 181):

"* * * that on appeal the determination of the trial court will not ordinarily be interfered with, except where a manifest abuse of discretion is disclosed."

Williams S.S. Co. Inc. v. Wilbur et al., 9 F. 2d 622, C. C. A. 9 Cir. (Dec. 14, 1925). In discussing the cause of the damage, an issue of fact, the court stated:

"The court below found in favor of this latter contention, and the finding is amply supported by the testimony. In such circumstances the finding will not be reviewed on appeal. The *Mazatlan* (C. C. A.) 287 F. 873, and cases there cited."

The District of Columbia, 74 F. 2d 977, C. C. A. 4 Cir. (Jan. 8, 1935): Findings of fact of a district court judge are presumptively correct and are treated with great respect. There will be no reversal unless shown to be contrary to the weight of evidence.

Lewis v. Jones, 27 F. 2d 72, C. C. A. 4 Cir. (June 12, 1928). Findings of fact by a trial court on conflicting evidence are not the proper subject of review on appeal.

The Josephine & Mary, 120 F. 2d 459, C. C. A. 1 (June 11, 1941) quoting *The Parthian*, C. C., D. Mass., 1891, 48 F. 564, the Court said:

"It is the established rule of this court that it will not reverse the conclusion reached by the district court upon a controverted question of fact, where the evidence is contradictory, unless it clearly appears to be contrary to the preponderance of evidence."

Standard Transp. Co. v. Wood Towing Corporation, 64 F. 2d 282;

Wellston Trust Co. of St. Louis, Mo. et al. v. Snyder, 87 F. 2d 44;

Matheson et al. v. Norfolk & North America Steam Shipping Co., Limited, et al., 73 F. 2d 177;

Malston Co., Inc. v. Atlantic Transport Co. of West Virginia et al., 37 F. 2d 570;

Thompson v. Chance Marine Const. Co., 45 F. 2d 584;

Kable v. United States, 175 F. 2d 16;

Mayfield et al. v. Pan American Life Ins. Co. et al., 49 F. 2d 906;

Cortes v. Baltimore Insular Line, Inc., 66 F. 2d 526;

Virgin v. United States, 165 F. 2d 81;

Escandon v. Pan American Foreign Corporation et al., 88 F. 2d 276;

The Scow No. 27, 164 F. 2d 778;

Koehler v. United States, 187 F. 2d 933;

The Cleveco, 154 F. 2d 605;

The Vinemoor, 75 F. 2d 28;

The Gezina, 89 F. 2d 300;

Read v. United States, 201 F. 2d 758.

Virginia Shipbuilding Corporation et al. v. United States, 22 F. 2d 38 (p. 51):

"It is settled that we will not reverse a finding of the District Court having support in the evidence unless we think that the judge has misapprehended the evidence or gone against the clear weight thereof or, in other words, unless we think that his findings was clearly wrong."

International Organization, United Mine Workers of America et al. v. Red Jacket Consol. Coal & Coke Co., 18 F. 2d 839;

Brooks v. Willcuts, 78 F. 2d 270;

First Nat. Bank of Ortonville, Minn. v. Andresen, 57 F. 2d 17;

Lambert Lumber Co. v. Jones Engineering & Construction Co., Inc., et al., 47 F. 2d 74;

Southern Surety Co. v. Fidelity & Casualty Co., 50 F. 2d 16.

The late Mr. Justice Murphy in the case of *Lavender v. Kurn, supra*, has stated that a contrary inference is neither a bar to recovery, nor is it a proper basis for re-litigation.

Mr. Justice Murphy further stated that a contrary inference becomes irrelevant on appeal.

We submit that a Trial Court should have the same power a jury has to reject unbelievable and medically unsound theories and inferences, particularly inferences which are unsupported by any proof and are contrary to the accepted facts and inferences which naturally flow from the evidence.

Under similar circumstances this Court in the case of *Myers v. Reading Co., supra*, stated at page 479:

“We granted certiorari in order to review this procedure, in a case based upon a violation of the Safety Appliance Acts, in the light of our decision rendered on March 25, 1946, in *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 421, subsequent to the trial of this case.”

The decision in the case at bar was in conflict with and subsequent to the decision in the case of *Pope & Talbot v. Hawn, supra*.

Mr. Justice Burton in the case of *Myers v. Reading Co., supra*, citing many authorities concluded at pages 485 and 486, as follows:

“Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary

basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kurn*, *supra*, 327 U. S. at page 653, 66 S. Ct. at page 744, 90 L. Ed. 421.

The Trial Court having resolved the disputed questions of facts and inferences on the basis of evidence, adjudicated by the Court below as sufficient to sustain a jury's verdict, we believe it was then beyond the province of the Court below to review the weight and sufficiency of the evidence and inferences to be drawn therefrom, on which the Trial Court made his findings in the case at bar.

Judge Augustus N. Hand, who wrote the opinion in the case at bar, as well as in that of the prior trial, has given expression to thoughts which seem to require clarification by this Court.

The recent case of *Pope & Talbot v. Hawn*, *supra*, precludes distinction between substantive rights at law or in Admiralty, and seems to emphasize the opinion in the case of *Cosmopolitan Shipping Co. Inc. v. McAllister*, *supra*.

Mr. Justice Reed writing for the prevailing opinion stated at page 791:

"The seaman's substantive rights are the same whoever is the employer. Under the Jones Act, his remedy permits him to demand a jury trial. If the Government is the employer, his remedy is in Admiralty without a jury."

The decision of the Court below seems to be in such conflict with the intent of Congress and the decisions of this Court that summary reversal would be justified. *Helvering v. Weiss*, 292 U. S. 614, 54 S. Ct. 862.

When an Act of Congress is given a meaning never before declared, or a stricter interpretation than the words

of the Act would have in ordinary usage, it would seem to be a matter of such great and general importance as to require an expression of its view by the Supreme Court of the United States so as to obviate such new rule of law attaining the force and/or effect of *stari decisis*.

There seems to have been a denial of due process of law in conflict with our system of government.

The late Charles Evans Hughes, Chief Justice of the United States said:¹⁰

“We are here not as masters, but as servants, not to glory in power, but to attest our loyalty to the commands and restrictions laid down by our sovereign, the people * * * in whose name and by whose will we exercise our brief authority. If as such representatives we have, as Benjamin Franklin said—‘no more durable pre-eminence than the different grains in an hour glass’—we serve our hour by unremitting devotion to the principles which have given our Government both stability and capacity for orderly progress in a world of turmoil and revolutionary upheavals.

* * * If we owe to the wisdom and restraint of the fathers a system of government which has thus far stood the test, we all recognize that it is only by wisdom and restraint in our own day that we can make that system last. If today we find ground for confidence that our institutions which have made for liberty and strength will be maintained, it will not be due to abundance of physical resources or to

¹⁰ Charles Evans Hughes, before a joint session of the Senate and House of Representatives of the United States, March 4, 1939; Merlo J. Pusey, Charles Evans Hughes (New York: MacMillan Co., 1951), p. 783.

productive capacity, but because these are at the command of the people who still cherish the principles which underlie our system and because of the general appreciation of what is essentially sound in our governmental structure."

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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